Supreme Court, U.S.
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No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1997

MICHAEL W. MOORE, Director, South Carolina Department of Corrections,

Petitioner,

-vs-

HARRY ALLEN PLYLER, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this case should be remanded with instructions to dismiss for lack of subject matter jurisdiction where the only named class representative unquestionably never had standing to bring the case?

II. Whether core principles of federalism are violated by permitting a class of prisoners, via a habeas corpus action, to avoid the decision of a state's highest court when seeking release only to a status akin to parole?

III. Whether federal habeas corpus relief should be denied for prudential or discretionary reasons where the plaintiff class obtained relief primarily as a result of a rule announced several years after the state court judgment had become final?

PARTIES TO THE PROCEEDING

Responents Plyler, et al. are so listed in the caption of the Complaint. In the first paragraph of the Complaint, Respondents are described as "two classes of prisoners presently housed and to be housed in the future in the South Carolina Department of Corrections serving sentences of less than life imprisonment for crimes committed after June 13, 1983, and before June 14, 1993."

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October Term, 1997

MICHAEL W. MOORE, Director, South Carolina Department of Corrections,

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-vs-

HARRY ALLEN PLYLER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Michael Moore, Director of the South Carolina Department of Corrections, asks that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, entered on October 16, 1997.

OPINIONS BELOW

The January 28, 1998 Order of the Court of Appeals denying Petitioner's motion to remand with instructions to dismiss is set forth in the Appendix herein at 1a. The November 13, 1997 Order of the Court of Appeals denying rehearing and rehearing en banc is set forth at 26a. The opinion of the Court of Appeals (App., *infra*, 2a-17a) is reported at 129 F.3d 728. The opinion of the district court (App., *infra*, 18a-25a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1997, and the defendant's petition for rehearing was denied on November 13, 1997. By order of the Chief Justice dated January 27, 1998, the time for filing this Petition was extended until March 13, 1998. App. 32a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2243 provides in pertinent part that in federal habeas corpus cases

> [t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. §2254(a) provides as follows:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of State court only on the grounds that he is in custody in

violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

This case was filed on behalf of a class of inmates claiming eligibility to participate in an state early release program. However, the only named plaintiff in the case has never been and never will be eligible to participate in the program because of the nature of the crime he committed.

In previous litigation in the state courts, the Supreme Court of South Carolina construed the state early release statute (*S.C. Code Ann.* '24-13-720) favorably to the inmate class, but concluded that an amendment limiting the statute effectively prevented the early release of most inmates. *Plyler v. Evatt*, 313 S.C. 405, 438 S.E.2d 244 (1993), App. 33a-36a. The court further held that this application of the amendment did not violate the ex post facto clause. App. 34a n.1.

The inmates did not seek certiorari of the decision of the Supreme Court of South Carolina, but instead filed the present separate federal action. The district court agreed with the inmates that the application of the amended statute to terminate their eligibility for the early release program violated the ex post facto clause. App. 18a- 25a. The Court of Appeals affirmed. App. 2a-17a.

The district court stayed its order pending the State's appeal, App. 28a, and the Fourth Circuit in turn stayed the issuance of the mandate pending the timely filing by the State of the present Petition. App. 27a. The inmates sought unsuccessfully before Chief Justice Rehnquist to vacate the Fourth Circuit's stay of mandate. App 30a. The inmates then asked the same relief of Justice Stevens, who referred the matter to the full Court, which denied the inmates' motion on January 12, 1998. App. 31a.

A. *The State Statute, its Amendment, and its Construction by the Supreme Court of South Carolina*

The history of this case begins with the above-referenced 1993 ruling by the Supreme Court of South Carolina which changed the longstanding administrative interpretation of a state statute first enacted in 1983, ten years prior to the Court's ruling. *Plyler v. Evatt*, 313 S.C. 405, 438 S.E.2d 244 (1993), App. 33a. That case held that *S.C. Code Ann.* §24-13-720 (main volume), permitted the early supervised release, within six months of the expiration of their sentences, of inmates convicted of violent as well as nonviolent crimes. The Department of Corrections from the time of the statute's enactment in 1983 had considered inmates convicted of violent offenses ineligible for the early release program.

While the case was pending before the Supreme Court of South Carolina, the General Assembly of South Carolina amended the statute so as to make it clear that violent offenders were not eligible for release within six months of the expiration of their sentences. *S.C. Code Ann.* §24-13-720 (Cum. Supp. 1998).[1] The Supreme Court of South Carolina held, over the State's objection, that the amendment changed the existing statute. 36a. The State had argued that the amendment merely clarified the legislature's prior intent that inmates convicted of violent crimes were ineligible for early release.

The court then held that the only inmates eligible for release prior to the 1993 amendment's effective date were those

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[1] This amendment was doubtless a reaction to the state trial court decision which like the state supreme court's ultimate decision concluded that violent inmates were entitled to early release under the original version of the statute.

"meeting the statutory requirements prior to the 1993 amendment," i.e., those who were within six months of the expiration of their sentences at the time of the amendment. 34a. The court further held that no ex post facto violation would result from applying the amended statute to most inmates sentenced while the prior statute was in effect. *Id.*, n.1.[2]

B. The Federal Suit.

The net practical effect of the various holdings of the Supreme Court of South Carolina was that few inmates qualified for early release under that court's interpretation of the statute and its amendment.[3] Nevertheless, the inmates did not seek certiorari in this Court of the state court's ex post facto conclusion. Instead, they filed the present federal action several months later, in early 1994. Both the district court and the Court of Appeals agreed with the inmates that if the statute meant what the state court said it meant between 1983 and 1993, the 1993 amendment to the statute would have an improper ex post facto effect if applied to inmates whose offenses were committed between 1983 and 1993. As a result, inmates in the South Carolina Department of Corrections whose violent offenses had always disqualified them from placement in an early release program were gratuitously made eligible for early release. When these inmates were convicted and sentenced between 1983 and 1993, no one, least of all these inmates, suspected that they would be eligible for six months' early

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[2] The ex post facto issue was briefed by the parties in the state case in supplemental briefs filed after the statute was amended.

[3] The court apparently authorized the early release of anyone who was within six months of the expiration of their sentence when the statute was amended in June 1993. This holding had a very limited impact, however, since the court's opinion was issued in November 1993, by which time most such inmates' sentences had already expired.

release under this program.

On appeal, the State argued that the federal courts lack jurisdiction over this case under the *Rooker-Feldman* doctrine.[4] This contention was rejected by the Court of Appeals, citing the habeas corpus exception to the *Rooker-Feldman* doctrine and *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

The State also contested the district court's ex post facto conclusions, but the Court of Appeals held that this Court's decision in *Lynce v. Mathis*, 117 S.Ct. 891 (1997) had "emphatically" rejected the same arguments which South Carolina was making in the present case. App. 14a.

There is no question that unless the Fourth Circuit's decision is reversed, the result will be the early release, over a number of years to come, to parole-like supervision of thousands of state prison inmates, convicted of both violent and nonviolent crimes. The initial release alone would number in the hundreds.

C. Jurisdictional Issues with Regard to the Named Plaintiff.

The statute underlying this case, *S.C. Code Ann.* §24-13-720, provides that inmates may participate in the Supervised Furlough Program "[u]nless sentenced to life imprisonment."[5] While reviewing the potential issues to be addressed in the present Petition, counsel for the Petitioner became aware that Harry Plyler, the only named plaintiff in this case and the purported representative of a class, has indeed been sentenced to

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[4] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[5] This part of the statute was present in both the original 1983 version and in the 1993 amendment

life imprisonment. He therefore will never be eligible for release under the Supervised Furlough Program. As a result, after the petition for rehearing had been denied by the Court of Appeals, but while the mandate was stayed pending the filing of the present Petition, the State filed in the Court of Appeals a motion to remand with instructions to dismiss for lack of jurisdiction. A certified copy of Plyler's indictment and sentence was attached to the motion. This motion was denied without opinion by the Court of Appeals on January 28, 1998. 1a. Instead, the court remanded the case to the district court "for the limited procedural purpose of identifying a representative" of the class. *Id.* The court directed the district court to effect this change before the expiration of the time for the filing of the present certiorari petition. *Id.*[6]

REASONS FOR GRANTING THE WRIT

I. No Case or Controversy Existed Below, Because the Only Named Plaintiff Clearly Lacked Standing to Bring this Action.

The State submits that this is a case in which certiorari should be granted, and the decision below summarily vacated with instructions to remand for the purpose of dismissing the action. There is no question that the named plaintiff has never had standing to pursue any claim raised by this case. From the inception of this action through the denial of rehearing by the Court of Appeals, the *only* named plaintiff was Harry Plyler, an inmate sentenced to life imprisonment who can never qualify for release under the Supervised Furlough Program.[7]

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[6] As of the date of printing of this Petition, nothing further had been heard from the district court.

[7] While counsel for both sides perhaps should have noticed this earlier, the practical significance of requiring a new action to be filed arose only after this Court's decision in *Lindh v. Murphy*, 117 S.Ct. 2059 (1997),

It is well settled that "[i]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself *or any other member of the class.*" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)(citations omitted)(emphasis added). The absence of standing in such an instance goes to the existence of a case or controversy. *Id.* It is axiomatic that in the absence of a case or controversy, the federal courts lack subject matter jurisdiction over an action. *See, e.g., Powell v. McCormack*, 395 U.S. 486, 512 (1969); *see generally, O'Shea, supra*. It is equally well settled, of course, that subject matter jurisdiction may be raised at any time. As held in *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994), "[s]tanding represents a jurisdictional requirement which remains open to review at all stages of the litigation. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546-547 (1986)."[8]

There is no question at all that subject matter jurisdiction was lacking throughout the proceedings below. The district court lacked jurisdiction from the outset of the case; it had no jurisdiction to enter a judgment, and the Court of Appeals had no jurisdiction to affirm that judgment. The only remaining question is whether the appropriate procedure was to dismiss the action in its entirety, as the State contends, or whether the case should have been remanded in order to permit counsel for the plaintiff class to find a new named plaintiff. The Court of Appeals erroneously chose the latter course. App. 1a.

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as discussed below.

[8] While the defendant did not contest the issue of class certification in the district court, subject matter jurisdiction cannot be conferred by stipulation or consent. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 398 (1975).

Counsel for the State has found no case which suggests that the procedure followed by the Court of Appeals in this case was appropriate. To the contrary, whenever a court has concluded that the named plaintiff lacked standing from the outset, the result has been a dismissal of the case. *See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976)(vacating Court of Appeals judgment and remanding with instructions to dismiss where all named plaintiffs in class action lacked standing); *Casey v. Lewis*, 4 F.3d 1516, 1524-25 (9th Cir. 1993)(same); *Lobue v. Christopher*, 82 F.3d 1081 (D.C. Cir. 1996)(same); *Johnson v. Dallas*, 61 F.3d 442 (5th Cir. 1995)(same); *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979 (11th Cir. 1990)(same); *Johnson v. Rodriguez*, 110 F.3d 299, 314-15 (5th Cir.), *cert. denied*, 118 S.Ct. 559 (1997)(remanding to determine whether the sole named plaintiff, not the class members, had suffered injury); *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981)(where named plaintiff lacks standing, "the proper procedure . . . is to dismiss the complaint, not to deny the class for inadequate representation or to allow other class representatives to step forward"); *Gabrielson v. BancTexas Group, Inc.*, 675 F. Supp. 367 (N.D. Tex. 1987); 1 Newberg on Class Actions §2.09 (3d ed. 1992).

The necessity for dismissing an action where the named plaintiff lacks standing follows from the language of many of this Court's cases on the subject. Thus, for instance, in *Warth v. Seldin*, 422 U.S. 490, 499 (1975), this Court affirmed the dismissal of a case by the district court, holding that a federal court's jurisdiction "can be invoked only when *the plaintiff himself* has suffered . . . injury. . . ." (Emphasis added). The Court specifically held that plaintiffs must show that "they personally have been injured, not that injury has been suffered by other, unidentified members of the class . . . ." *Id.* at 502. *Accord, Blum v. Yaretsky*, 457 U.S. 991, 1001 n.13 (1982). As already noted, in *Simon v. Eastern Kentucky Welfare Rights*

Organization, 426 U.S. 26 (1976), this Court vacated a Court of Appeals judgment and remanded with instructions to dismiss where all then named plaintiffs in a class action lacked standing.

A dismissal of this action, as opposed to the mere remand ordered by the Court of Appeals, could have significant practical consequences. If the plaintiff class had sought certiorari of the state court decision in 1994, it is likely that such a petition would have been denied, based on this Court's action in several similar cases. It was not until early in 1997 that this Court "emphatically rejected," as the Fourth Circuit put it, an argument practically identical to the State's argument in the present case. *Lynce v. Mathis*, 117 S.Ct. 891 (1997). This development in the substantive law to the benefit of the inmates could be offset in future litigation by application of current 28 U.S.C. §2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (1996). That act was not available to the State in the present case (pending when that Act passed in 1996) as a result of *Lindh v. Murphy*, 117 S.Ct. 2059 (1997).[9] Amended 28 U.S.C. §2254(d)(1) provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
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> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States . . . .

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[9] *Lynce* held that the Antiterrorism and Effective Death Penalty Act of 1996 could not be applied in pending cases.

In the event of a dismissal of this case, and refiling by a plaintiff with standing, the plaintiff class would face a much higher burden in arguing that the decision of the state court (which clearly was a decision "on the merits") was contrary to or an unreasonable application of this Court's case law. If such had been the case, it is unlikely that this Court would have denied certiorari in several cases reaching the same result under very similar facts. See 19-20, *infra*. While this is a point which would be litigated in any new litigation, the governing law in any such future litigation clearly might be substantially different from that which governed the present case. Thus a dismissal of this case on grounds of jurisdiction would not be a mere academic exercise, but would allow the case to be governed by *all* changes in the law since the state court decision in 1993, not just those changes which have favored the inmates, as has been true so far in the present case.

Finally, this case is entirely different from the line of cases exemplified by *Sosna v. Iowa*, 419 U.S. 393 (1975). Cases such as *Sosna* permit substitution of the class representative when the original class representative had standing at the outset but then lost it as a result of some event which mooted the case as to the named representative. This line of cases does not apply here since the named plaintiff has never had standing. Indeed, for cases such as the present one, *Sosna* reiterates the familiar rule that "[t]here must . . . be a named plaintiff who has . . . a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23. . . ." *Sosna*, 419 U.S. at 402.

II. Core Principles of Federalism are Violated by Permitting a Class of Prisoners, via a Habeas Corpus Action, to Avoid the Decision of a State's Highest Court when Seeking Release

only to a Status akin to Parole.[10]

This case exposes a logical anomaly in this Court's approach to the writ of habeas corpus in the federal courts. Under this Court's current decisions, prison inmates have it both ways. If an inmate seeks release from prison to parole supervision, the obtaining of parole status is considered a sufficient release from custody as to be appropriate for habeas corpus relief under 28 U.S.C §2254. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). On the other hand, when a prisoner seeks to move from parole to unrestricted release, his status on parole is deemed to be sufficiently "in custody" to permit the filing of a habeas petition in that instance as well. *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)(holding that parole "imposes conditions which significantly confine and restrain [the petitioner's] freedom"). The State submits that the interests of law-abiding society would be served by limiting this rule which currently provides a "heads I win, tails you lose" result for convicted felons. Specifically, the State submits that for purposes of habeas corpus review, the potential move from prison to supervised release should be regarded as an issue regarding conditions of confinement rather than a habeas corpus issue. So viewed, the issue would be one for a Section 1983 action, and such actions would be barred by the *Rooker-Feldman* doctrine where, as here, the case has been reviewed by the state's highest court and certiorari has not been sought.

Under the *Rooker -Feldman* doctrine, federal courts lack subject matter jurisdiction to review state court dispositions of constitutional issues. Habeas corpus cases, almost always arising in the context of the petition of a single individual, have been regarded as an exception to the rule of *Rooker* and *Feldman*. *See, e.g., Sumner v. Mata*, 449 U.S. 539, 543-44

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[10] The remaining points made herein are alternative arguments in the event the Court concludes that jurisdiction was present.

(1981). This case thus presents a collision between the principles underlying the *Rooker-Feldman* rule and its habeas corpus exception. The principle which should give way under the facts of this case is not the *Rooker-Feldman* doctrine, but the habeas corpus exception. While the Court of Appeals may have felt bound by statements in the decisions of this Court, none of those statements were issued in situations anything like the unique facts of this case. This Court, of course, created the *Rooker-Feldman* doctrine and is the final arbiter of the scope of the habeas corpus exception to that doctrine.

Federal habeas corpus in general has been acknowledged to "offend[] federalism and comity." *McCleskey v. Zant*, 499 U.S. 467, 492 (1991). As a result, its use is "limited to cases of special urgency." *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973). This Court's opinions are replete with language indicating the special and extraordinary nature of federal habeas corpus. A number of these characterizations are collected in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Citing many prior cases, the Court held that "the writ of habeas corpus has historically been viewed as an extraordinary remedy, a bulwark against convictions that violate fundamental fairness." 507 U.S. at 633 (citations and internal quotation marks omitted). The Court further noted that the writ is reserved for those "whom society has grievously wronged," *id.* at 634, and is designed only to guard against "extreme malfunctions in the state criminal justice systems," and to prevent results which effect "a complete miscarriage of justice." *Id.* (citations and internal quotation marks omitted).[11] These ringing phrases are grossly out of place when applied to a situation where the state's highest court,

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[11] The same opinion of the high calling of the writ is expressed by the Dickens character Sam Weller: "'wy, none o' them unconstitootional ways o' doing it,' retorted Sam. 'The have-his-carcase, next to the perpetual motion, is vun of the blessedest things as wos ever made.'" Dickens, *The Pickwick Papers*, Ch. 43.

consistently with results in this Court at the time, found no constitutional violation, and where the only thing at stake was a conditional form of supervised release for no more than six months, a release which few if any of the inmates could have counted upon at the time they were sentenced.

There are relatively few cases in which a prisoner seeks federal habeas review of the issue of whether he should be released immediately to a status akin to parole. There is no case in which this Court has specifically addressed the issue of whether the change of status from imprisonment to parole should be regarded as serious enough as to permit reversal of the state's highest court as an exception to the *Rooker-Feldman* doctrine. *Preiser v. Rodriguez*, *supra*, while deciding that a challenge which would have resulted in release on parole was a habeas case, involved only the individualized *ad hoc* complaints of a few inmates, and no contrary decision on a policy matter by the state's highest court. The result reached in *Preiser* served to advance federalism by requiring exhaustion of state remedies.

In addition, there is a conflict among the circuits about whether the relief sought by inmates in similar circumstances is properly viewed as sounding in habeas corpus or in civil rights. This conflict has arisen even in the absence of direct *Rooker-Feldman* concerns, i.e., even though there was no unappealed-from state court decision in the same case. Thus in two Third Circuit cases, *Wright v. Cuyler*, 624 F.2d 455 (3d Cir. 1980) and *Jamieson v. Robinson*, 641 F.2d 138 (3d Cir. 1980), that Circuit concluded that suits asserting inmates' eligibility for temporary home furlough or work release, respectively, were attacks on the conditions of confinement. The Third Circuit thus concluded that these matters should be brought as § 1983 actions rather than as habeas cases.

On the other hand, the First Circuit, in *Brennan v. Cunningham*, 813 F.2d 1 (1st Cir. 1987), concluded that a

potential move from direct incarceration to work release sounded in habeas corpus.[12] Finally, in *Graham v. Broglin*, 922 F.2d 379 (7th Cir. 1991), the Seventh Circuit agreed with the Third Circuit that the issue of eligibility for a work release program was one for a civil rights action, but noted in dictum that if release on parole had been sought, the proper remedy would have been habeas corpus. 922 F.2d at 381.

The only consistent thread of the cases cited above is that the result of each one cleared the way for the inmate to assert his challenge within the existing litigation. This puts some of these cases in direct conflict with the policy advanced by *Preiser*, on which these cases rely. The entire premise of *Preiser* was that by deeming the matter a habeas case, the *Preiser* rule would require exhaustion, a rule "rooted in considerations of federal-state comity." 411 U.S. at 491. In the present case, the interests of federalism and comity would be served by holding that the habeas corpus exception to *-Feldman* does not apply when the respective interests of the inmates and the State are weighed together.

As this conflict indicates, the determination of whether a case such as this is a case involving release from confinement, as opposed to conditions of confinement, has sometimes been difficult. As one court noted:

> [t]he Supreme Court cases do not . . . make it easy to separate claims that challenge the "fact or duration" of confinement and claims that challenge procedures having some effect on release decisions but also constituting

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[12] The court mentioned several cases from other circuits which regarded such a challenge as a § 1983 matter without considering whether habeas would have been more appropriate. 813 F.2d at 5 n.4. The court did not, however, mention the *Jamieson* case from the Third Circuit which had reached a contrary result.

> "conditions" of confinement. Defining the precise contours of the boundaries between *Preiser* and *Wolff*[13] consequently has proved to be an elusive goal.

Serio v. Members of Louisiana State Board of Pardons, 821 F.2d 1112, 1116 (5th Cir. 1987).

A determination that a prisoner serve the last six months of his validly-imposed sentence in prison, rather than on a parole-like status, is simply not of the level of urgency or importance necessary to invoke the habeas corpus exception to the *Rooker-Feldman* doctrine. This is especially true when the issue arises not in the isolated case of one prisoner, but in a case involving the state court's determination as to how the state's sentencing procedures would operate.

More important than simple logical consistency, however, is the notion that federalism should not be transgressed by the relatively minor move from prison to supervised release for a period of six months or less. The State accordingly submits that to the extent *Preiser* holds that habeas properly lies to obtain *any* release from physical custody into the status of a parolee, *Preiser* strains federalism too far, and should be limited to cases where the early release is of more significant duration. As a result, the State submits that *Rooker-Feldman* principles should govern in such habeas cases.

III. Federal Habeas Corpus Relief Should be Denied for Prudential or Discretionary Reasons where the Inmates' Alleged Right to Relief Arises only out of Fortuitous Timing.

For as long as this Court has recognized broad habeas corpus review of state court decisions, such review has been

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[13] *Wolff v. McDonnell*, 418 U.S. 539 (1974).

limited by federal-state comity. *Fay v. Noia*, 372 U.S. 391, 425-26 (1963)(recognizing that federal courts will sometimes forgo the exercise of habeas corpus powers). *Fay* likewise reaffirmed the longstanding rule that "habeas corpus has traditionally been regarded as governed by equitable principles." *Id.* at 438. This limitation on habeas corpus review is inherent in 28 U.S.C. §2243, which provides in part that "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

Cases since *Fay* have continued to apply equitable principles to federal habeas cases. For example, in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986)(plurality opinion), the plurality opinion recognized that federal habeas provides "a forum to test the *basic justice* of his confinement. . . ." 477 U.S. at 452 (emphasis added). Balanced against this interest are "the interests of the State in the administration of its criminal statutes." *Id.* The result in *Kuhlmann* was a conclusion that the "ends of justice" would not be served by considering a successive habeas petition. 477 U.S. at 444-46 (citing *Sanders v. U.S.*, 373 U.S. 1 (1963). If the demonstration of a violation of a constitutional right were enough in itself to warrant the granting of habeas relief, there would be no need for balancing, or for considering the ends of justice.[14] However, even when a case falls within established guidelines for discretionary or prudential denial of the writ, a court in the prisoner's interest will consider whether to "exercise its equitable discretion to correct a miscarriage of justice." *McCleskey v. Zant*, 499 U.S. 467, 502 (1991); *see also, e.g., Murray v. Carrier*, 477 U.S. 478 (1986)(procedurally defaulted claim may be reached if

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[14] The Court has exercised discretion in a number of other situations to deny habeas relief. *See, e.g., Stone v. Powell*, 428 U.S. 465 (1976)(Fourth Amendment exclusionary rule); *Coleman v. Thomas*, 501 U.S. 722 (1991)(procedural default); *McCleskey v. Zant*, 499 U.S. 467 (1991)(abuse of the writ).

constitutional violation probably resulted in the conviction of an actually innocent person).[15] This supervening level of equitable review should also be available to a state in a case which would result in the early release of thousands of prisoners as the result of an unexpected technicality.

There are ample grounds in this case for refusing relief to the inmates on discretionary or prudential grounds. To begin with, the inmates who would be released early and who committed violent crimes would be the beneficiaries of a complete windfall if the judgment below stands. Until the state case was filed in 1992, no one had suggested that the original 1983 statute should permit violent inmates to be released early under the Supervised Furlough Program.[16] In addition, the state court's statutory interpretation which underlies the present case, and which preceded its ex post facto ruling, seems to have been mistaken.[17] The state court avoided the early release of thousands of inmates only by concluding that the amended statute did not violate ex post facto principles, a conclusion which the courts below have effectively reversed.

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[15] *Lonchar v. Thomas*, 517 U.S. 314 (1996), which holds that equitable jurisdiction should not be exercised in an ad hoc manner, does not preclude relief to the State in this case. In *Lonchar*, the Court had before it a not-unusual request for last-minute relief in a capital case. *Lonchar* has nothing to say about an extraordinary factual situation such as is present here.

[16] This alone distinguishes this case from most ex post facto cases, including *Lynce, supra*. In most cases the change is made to a right which had been clear under the prior law. In *Lynce*, for example, the right had actually affected sentences; some of the inmates had been released, only to be re-incarcerated.

[17] The Court of Appeals certainly intimated its belief that the state court's decision was wrong, 17a n.10, but the state court's decision appears to be the final word on this question of state law.

Moreover, the inmates' success in this case has been largely a matter of fortuity in timing. It is reasonably certain that by not seeking certiorari at the time the state court decision became final, the inmates found themselves in a favorable position simply as the result of changes and clarifications in the law after 1993. It was not until early in 1997 that this Court "emphatically rejected," as the Fourth Circuit put it, an argument practically identical to the State's argument in the present case. *Lynce v. Mathis*, 117 S.Ct. 891 (1997). It is unlikely, however, that the 1993 decision of the Supreme Court of South Carolina would have met the same fate; to the contrary, had the inmates in the present case petitioned for certiorari from the 1993 state court decision, it is fairly certain that certiorari would have been denied, as shown below.

In 1992 and 1996 this Court denied certiorari in several similar Florida cases arising both in state and federal courts. Those cases had rejected ex post facto challenges to changes in the Florida statute which granted credits to inmates for use in the event of the prison population reaching a certain level. *Hock v. Singletary*, 41 F.3d 1470 (11th Cir. 1995), *cert. denied*, 116 S.Ct. 715 (1996); *Dugger v. Roderick*, 584 So.2d 2 (Fla. 1991), *cert. denied*, 112 S.Ct. 112 S.Ct. 886 (1992). *Hock* had held that the provision permitting the buildup of early release credit could validly be restricted because its purpose was only "to address the problem of prison overcrowding, not to confer a benefit on the prison population." 41 F.3d at 1472. *Dugger* had reached the same result, holding that the program was "procedural in nature, [and] not directed toward the traditional purposes of punishment." 584 So.2d at 4. The rationale of these cases was similar to that used by the Supreme Court of South Carolina, which held that the program was "not part of the defendant's sentence." 34a, n.1. In support of its holding on the ex post facto issue, the court cited a case (*Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989)) which held that "the purpose behind the enactment of *S.C. Code Ann.* §24-13-710

was to help alleviate prison overcrowding [and] was not to confer substantial rights upon certain members of the prison population." *Id.* This rationale is strikingly similar to that of *Hock, supra.* There is no reason to think that the 1993 decision of the Supreme Court of South Carolina would not likewise have been denied review; indeed, this case may well have been *more* likely not to have been accepted by this Court since the "right" to early release was not even recognized to have existed until after the legislature had already eliminated it.[18]

The State also submits that habeas relief should be denied pursuant to the rule of *Teague v. Lane*, 489 U.S. 288 (1989). The Court of Appeals concluded that *Teague* had not been raised below, but was inapplicable in any event. 16a n.9.[19] However, it would appear that *Teague* is generally applicable to any federal habeas case involving a collateral attack on a state judgment. *See Graham v. Collins*, 506 U.S. 461, 466-67 (1993). *O'Dell v. Netherland*, 117 S.Ct. 1969 (1997), cited by the court below as indicating the contrary, does not suggest a limitation only to judgments of conviction or sentence, as the court concluded. Moreover, the present judgment is in fact a judgment affecting the sentences of thousands of inmates. While this case presents broader reasons for denying the habeas petition than simply the timing of the *Lynce* case, the principles of *Teague* provide an additional reason for the denial of habeas

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[18] The State, of course, recognizes that denial of certiorari does not constitute an opinion on the merits. The above cases are not cited as precedent in the present case, but rather are cited to suggest that the same result might likely have occurred if this case had reached this Court during the period when certiorari was denied in those cases.

[19] Since the Court of Appeals raised the *Teague* issue *sua sponte* and decided it, the issue may be reviewed by this Court. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Moreover, the issue is a "pure issue of law," as the Court chose to address in *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982).

relief.

It is settled that "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *United States v. Frady*, 456 U.S. 152, 165 (1982)(quoting *United States v. Addonizio*, 442 U.S. 178, 184 (1979). This rule applies *a fortiori* to this case, where a final judgment which probably would *not* have been reversed on direct appeal likewise should not be subject to collateral attack.

Finally, current law prevents the use in this pending litigation of current 28 U.S.C. §2254(d)(1) as amended in 1996 by the Antiterrorism and Effective Death Penalty Act. The application of that statute to this case could well affect the result, as already discussed.

For all of the above reasons, this case is one in which the inmates' ability to prevail has been based on a succession of technicalities which all have turned in their favor. Their sentences were regarded as valid when entered. For nearly ten years after the statute was enacted, no one suggested that violent criminals had a right to be placed in the Supervised Furlough program. When the state court held otherwise, its conclusion on the merits was offset by its conclusion that the statute could be amended without offending ex post facto principles. If the inmates had sought certiorari of that conclusion, this Court would likely have declined to review it. Even in the present federal case, if the district court had ruled earlier on this issue, the case might have reached this Court and had certiorari denied as in *Hock, supra*, where the writ was denied in 1996. The federal courts have the power to refuse to grant habeas corpus relief in their discretion, and this case provides many reasons for the exercise of that discretion in the State's favor.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Order of the Court of Appeals
Denying Motion to Remand for
Lack of Jurisdiction

Filed January 28, 1998

Harry Allen PLYLER, et al., Petitioners-Appellees,

v.

Michael W. MOORE, Director, South Carolina Department of Corrections,
Respondent-Appellant.
No. 96-7689.

United States Court of Appeals,
Fourth Circuit.

ORDER

The motion to remand with instructions to dismiss for lack of jurisdiction is denied. This case is remanded to the district court for the limited procedural purpose of identifying a representative of the subclass of inmates certified by the district court in its order entered September 30, 1996 and amending the case caption to reflect the name of the identified representative. The panel is confident that this matter can be resolved expeditiously so as not to interfere with the February 10, 1998 [sic] deadline for the filing of a petition for a writ of certiorari with the United States Supreme Court.

Entered at the direction of Judge Wilkins with the concurrence of Judge William L. Osteen, Sr., U.S. District Judge for the Middle District of North Carolina, sitting by designation.

For the Court
/s/ Patricia S. Connor
Clerk

APPENDIX B

Opinion of the
United States Court of Appeals
for the Fourth Circuit

129 F.3d 728

Harry Allen PLYLER, et al., Petitioners-Appellees,
v.
Michael W. MOORE, Director, South Carolina Department of Corrections,
Respondent-Appellant.
No. 96-7689.

United States Court of Appeals,
Fourth Circuit.

Decided Oct. 16, 1997.

Before RUSSELL and WILKINS, Circuit Judges, and OSTEEN, United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge WILKINS wrote the opinion, in which Judge DONALD S. RUSSELL and Judge OSTEEN joined.

WILKINS, Circuit Judge:

In 1981, the General Assembly of South Carolina provided for a supervised furlough program for prisoners; however, inmates who had committed specified crimes were excluded from participation in the program. *See* S.C.Code Ann.

§ 24-13-710 (Law. Co-op. Supp. 1981).[1] Two years later, the General Assembly enacted a statute providing for the mandatory release on supervised furlough of all prison inmates serving sentences of less than life imprisonment six months prior to the expiration of their sentences. *See* S.C.Code Ann. § 24-13-720 (Law. Co-op. 1989). Although this latter provision referenced § 24-13-710, it did not address specifically whether inmates excluded from participation in the supervised furlough program of § 24-13- 710 were also excluded from participation in the mandatory furlough program of § 24-13-720. In 1993, the General Assembly amended § 24-13-720 to incorporate the eligibility criteria contained in § 24-13-710 and to make the program permissive rather than mandatory. *See* S.C.Code Ann. § 24-13-720 (Law. Co-op. Supp. 1993).

Considering the relationship between the two statutes, the Supreme Court of South Carolina held that the exclusions contained in § 24-13-710 did not apply to inmates entitled to mandatory release on furlough under § 24-13-720 as that statute was originally enacted. *See Plyler v. Evatt*, 313 S.C. 405, 438 S.E.2d 244, 246 (S.C. 1993) (holding "that the two statutes refer to two different classes of inmates and that the conditions for participation created by [§ 24-13-710] are not implied in [§ 24-13-720]"). The court reasoned that the amendment of § 24-13-720 was not a clarification of the law, but rather constituted a substantive change. *See id.* The court also concluded in a footnote that application of the amended version of the statute to inmates who were not within six months of the expiration of their sentences at the time of the 1993 amendment did not offend ex post facto principles. *See id.* at 245 n. 1.

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[1]The furlough program was amended in 1983 to impose additional restrictions on eligibility for participation. *See* S.C.Code Ann. § 24-13-710 (Law. Co-op.Supp.1983). Additionally, subsequent amendments have occurred that are not material to this litigation. For ease of reference, we refer to § 24-13-710 as it existed in 1983. *See id.*

This action subsequently was filed in federal district court by members of the plaintiff class of inmates involved in the state litigation, claiming that application of the 1993 version of § 24-13-720 to prisoners serving sentences of less than life imprisonment for crimes committed between the 1983 enac nt of § 24-13-720 and its amendment in 1993 violated the Ex ost Facto Clause of the United States Constitution.[2] *See* U.S. Const. art. I, § 10, cl. 1. The district court agreed and accordingly enjoined application of the amended statute to the Inmates. The State[3] now appeals that decision, asserting two alternative arguments. First, the State contends that because this litigation essentially amounts to an appeal of the ex post facto ruling of the Supreme Court of South Carolina in *Plyler*, we lack subject-matter jurisdiction under the *Rooker-Feldman* doctrine. Second, the State maintains that application of the amended version of § 24-13-720 to the Inmates does not violate the Ex Post Fac Clause because the furlough program in question is not a part the Inmates' sentences. For the reasons that follow, we affirm.

I.

The "supervised furlough program" allows "carefully screened and selected inmates who have served the mandatory minimum sentence as required by law ... to be released on furlough" subject to "policies, procedures, guidelines, and cooperative agreement[s]" developed by the Department of Corrections and the Parole and Community Corrections Board.

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[2]We refer to such prisoners collectively as "the Inmates."

[3]This action ori ally named Parker Evatt, former Commissioner of the South Carolina Department of Corrections. Evatt subsequently was succeeded by Michael W. Moore as Director of the South Carolina Department of Corrections. For ease of reference, we refer to Moore as "the State" throughout this opinion.

S.C. Code Ann. § 24-13-710 (Law. Co-op. Supp. 1983). The General Assembly later enacted the provision at issue in this case, which provided:

> Unless sentenced to life i[m]prisonment, an inmate under the jurisdiction or control of the Department of Corrections shall, within six months of the expiration of his sentence, be placed with the program provided for in § 24- 13-710 and shall be subject to every rule, regulation, and condition of such program. No inmate otherwise eligible under the provisions of this section for placement with the program under § 24-13-710 may be so placed unless he has maintained a clear disciplinary record for at least six months prior to eligibility for placement with such program.

S.C. Code Ann. § 24-13-720 (Law. Co-op. 1989). While § 24-13-710 excludes any inmate who is incarcerated for certain crimes or who has "been committed to the State Department of Corrections with a total sentence of five years or less as the first or second adult commitment for a criminal offense for which the inmate received a sentence of one year or more," S.C. Code Ann. § 24-13-710, these limitations were not expressly incorporated in § 24-13-720.

Although the program is termed a "furlough," inmates released under it agree to conditions identical in all material respects to the conditions imposed on parolees concerning, *inter alia*, residence, employment, use of illegal drugs, and possession of weapons. Inmates who violate these conditions are subject to revocation proceedings before the Department of Probation, Parole, and Pardon Services. Moreover, inmates who participate in the furlough program report to, and are supervised by, state parole officers.[4]

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[4]Indeed, during oral argument the State repeatedly asserted that the

In 1993, the General Assembly significantly amended § 24-13-720. The amended statute provides:

> Unless sentenced to life imprisonment, an inmate under the jurisdiction or control of the Department of Corrections *who has not been convicted of a violent crime* ... *may*, within six months of the expiration of his sentence, be placed with the program provided for in Section 24-13-710 and is subject to every rule, regulation, and condition of the program. *No inmate otherwise eligible under the provisions of this section for placement with the program may be so placed unless he has qualified under the selection criteria and process authorized by the provisions of Section* 24-13-710. He must also have maintained a clear disciplinary record for at least six months prior to eligibility for placement with the program.

S.C. Code Ann. §24-13-720 (Law. Co-op. Supp. 1993) (emphasis added).[5] Later that year, the Supreme Court of South Carolina issued a decision regarding the scope of § 24-13-720 as it existed prior to the 1993 amendment, holding that the conditions for participation in the furlough program under § 24-13-710 did not apply to inmates entitled to mandatory release on furlough pursuant to § 24-13-720. *See Plyler v. Evatt*, 313 S.C. 405, 438 S.E.2d 244, 246 (S.C. 1993). In other words, the court ruled that all inmates serving sentences of less than life imprisonment, including those unable to satisfy the eligibility criteria for the supervised furlough program of § 24-13-710, were

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supervised furlough program is indistinguishable from parole.

[5]The statute was again amended, in a manner not material to this litigation, in 1995. *See* S.C. Code Ann. § 24-13-720 (Law. Co-op. Supp. 1996).

entitled to participate in the mandatory furlough program of § 24-13-720. The court also stated in a footnote that application of the amended version of § 24-13-720 to any inmate who was not within six months of the expiration of his sentence when the 1993 amendment became effective would not violate ex post facto principles. *See id.* at 245 n. 1.

The Inmates subsequently filed this action in federal district court, seeking declaratory and injunctive relief on the basis that application of § 24-13-720 as amended in 1993 to prisoners serving sentences of less than life imprisonment for crimes committed between the enactment of § 24-13-720 in 1983 and its amendment in 1993 would violate the Ex Post Facto Clause of the United States Constitution. The district court concluded that application of the amended version of § 24-13-720 to such prisoners would retroactively increase punishment for their crimes and therefore was ex post facto. *See generally Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (explaining that a law is ex post facto if, *inter alia*, it increases the punishment for a crime previously committed). Accordingly, the court ordered injunctive relief in favor of the Inmates. Upon a motion by the State, however, the district court stayed its order pending appeal to this court.

II.

The State first argues that we lack subject-matter jurisdiction to consider the Inmates' ex post facto claim because a ruling in favor of the Inmates would nullify the contrary judgment of the Supreme Court of South Carolina in *Plyler*, thereby violating the *Rooker-Feldman* doctrine. *See District of Columbia Ct. App. v. Feldman*, 460 U.S. 462, 482-86, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 68 L.Ed. 362 (1923).[6] Under the

[6]The State did not raise this argument before the district court.

Rooker-Feldman doctrine, lower federal courts generally do not have jurisdiction to review state-court decisions; rather, jurisdiction to review such decisions lies exclusively with superior state courts and, ultimately, the United States Supreme Court. *See Leonard v. Suthard*, 927 F.2d 168, 169-70 (4th Cir.1991); *see also Young v. Murphy*, 90 F.3d 1225, 1230 (7th Cir.1996). The *Rooker-Feldman* doctrine bars consideration not only of issues actually presented to and decided by a state court, but also of constitutional claims that are "inextricably intertwined with" questions ruled upon by a state court, as when success on the federal claim depends upon a determination "that the state court wrongly decided the issues before it." *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir.1995); *see Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 25, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (Marshall, J., concurring in the judgment) ("Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment."). However, the *Rooker-Feldman* doctrine does not bar review of a ruling of a state court in habeas corpus proceedings. *See Jordahl v. Democratic Party*, No. 96-2402, 1997 WL 418450, at *6 (4th Cir. July 28, 1997); *Ritter v. Ross*, 992 F.2d 750, 753 (7th Cir. 1993).

Here, the State contends that the Inmates effectively are seeking review of the decision of the South Carolina Supreme Court that "[t]here is no ex post facto violation in applying [§ 24-13-720 as amended in 1993] to individuals who committed offenses before its effective date." *Plyler*, 438 S.E.2d at 245 n. 1 (emphasis omitted).[7] In response, the Inmates argue that the

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However, questions concerning subject-matter jurisdiction may be raised at any time by either party or sua sponte by this court. *See North Carolina v. Ivory*, 906 F.2d 999, 1000 n. 1 (4th Cir. 1990).

[7]We note that the Supreme Court of South Carolina did not specify

Supreme Court of South Carolina did not actually decide the ex post facto question because the issue was not directly before the court. Alternatively, the Inmates maintain that this litigation sounds in habeas corpus and that we therefore do not lack subject-matter jurisdiction to consider the merits of their claim.

In order to determine whether the Supreme Court of South Carolina decided the ex post facto issue in *Plyler*, review of the proceedings in state court is necessary. As the Inmates correctly point out, the primary issue before the court in *Plyler* concerned the proper construction of § 24-13-720 as it existed prior to the 1993 amendment. Before rendering a decision, however, the court requested supplemental briefing on the question of whether the 1993 amendment to § 24-13-720 rendered the litigation moot. In responding to that question, the State argued in part that "application of the amended version [of § 24-13-720] to all inmates would not violate the prohibition against ex post facto laws." Supplemental Brief of Appellants at 10, *Plyler v. Evatt*, 313 S.C. 405, 438 S.E.2d 244 (S.C. 1993) (No. 23928) (emphasis omitted). In reply, the Inmates argued that application to them of § 24-13- 720 as amended would violate the Ex Post Facto Clause. In its original opinion, the Supreme Court of South Carolina declined to decide whether application to the Inmates of § 24-13-720 as amended in 1993 would be constitutional. *See Plyler v. Evatt*, No. 23928, slip op. at 3 n. 2 (S.C. Aug. 26, 1993). The State subsequently petitioned for

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whether its decision rested on an interpretation of the state or federal Ex Post Facto Clause. *See* U.S. Const. art. I, § 10, cl. 1; S.C. Const. art. I, § 4. Resolution of this question is immaterial to the outcome of this litigation, however. To the extent the Supreme Court of South Carolina relied on the South Carolina Constitution, the *Rooker-Feldman* doctrine is not implicated and subject-matter jurisdiction is present because this litigation presents a different question. To the extent the decision in *Plyler* involved application of the United States Constitution, subject-matter jurisdiction exists notwithstanding the *Rooker-Feldman* doctrine because, as discussed below, this action sounds in habeas corpus.

rehearing, asserting that it interpreted the ruling of the court to apply only to those prisoners then entitled to mandatory release on furlough. As to all other inmates, including those serving sentences of less than life imprisonment fc crimes committed between 1983 and 1993, the State informed the court that it intended to apply the amended version of § 24-13-720. The State also advised the court that counsel for the Inmates had indicated an intention to file an action challenging the State's proposed application of amended § 24-13-720 as violative of the Ex Post Facto Clause of the United States Constitution. Accordingly, the State requested a decision on the question of whether application of the amended version of § 24-13-720 to inmates serving sentences of less than life imprisonment for crimes committed between 1983 and 1993 would pass constitutional muster. The Supreme Court of South Carolina granted the petition for rehearing, withdrew its original opinion, and substituted a new opinion deciding the ex post facto issue in a footnote.[8] *See Plyler*, 438 S.E.2d at 245 n. 1. Thus, it is clear that the question raised by the Inmates in this federal litigation--whether application of the amended version of § 24-13-720 to individuals sentenced to less than life imprisonment for crimes committed between 1983 and 1993 violates the Ex Post Facto Clause--was litigated before, and decided by, the Supreme Court of South Carolina.

Having determined that the issue of whether application to the Inmates of the 1993 amendment to § 24-13-720 violates the Ex Post Facto Clause was actually decided, it is self-evident that

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[8]In light of this sequence of events, we are at a loss to explain the repeated assertions by counsel for the State that the Inmates initially raised the ex post facto issue and urged the Supreme Court of South Carolina to decide it. Counsel's statements are particularly baffling in view of the fact that he was an attorney of record in the proceedings before the state court. Of course, it is immaterial to our determination of the jurisdictional question which party prompted the Supreme Court of South Carolina to consider whether application to the Inmates of the amended version of § 24-13-720 violates the Ex Post Facto Clause.

the present litigation essentially amounts to nothing more than an attempt to seek review of that decision by a lower federal court. The ruling sought by the Inmates--that application to them of the 1993 amendment to § 24-13-720 violates the Ex Post Facto Clause--would nullify the contrary holding of the Supreme Court of South Carolina in *Plyler* to the extent that holding relied on an interpretation of the United States Constitution. Accordingly, the *Rooker-Feldman* doctrine bars subject-matter jurisdiction unless this action is one for habeas corpus relief.

The Inmates maintain that their request for relief sounds in habeas corpus and that as such it has been exempted by Congress from the ambit of the *Rooker-Feldman* doctrine. *See Jordahl*, 122 F.3d 192, 1997 WL 418450, at *6. It is well settled that challenges to the fact or length of confinement are properly considered in the context of habeas corpus. *See Preiser v. Rodriguez*, 411 U.S. 475, 487-88, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973) (holding that a challenge to the length of "actual confinement in prison" must be brought as a habeas corpus action). In *Preiser*, state prisoners brought actions pursuant to 42 U.S.C.A. § 1983 (West 1994) seeking the restoration of "good time" credits that, if awarded, would have entitled the prisoners to immediate release on parole. *See Preiser*, 411 U.S. at 477 (describing the program pursuant to which the credits had been awarded). The Court concluded that such an action was one challenging the legality of physical confinement and thus that the only proper avenue for relief was a petition for a writ of habeas corpus. *See id.* at 487 (concluding that the relief sought by the prisoners "fell squarely within [the] traditional scope of habeas corpus"). Here, the Inmates seek to be released from confinement into a program that is virtually indistinguishable from parole. Thus, although the Inmates do not challenge the validity of their convictions and sentences, but rather assert an entitlement to serve the last six months of their sentences on supervised furlough pursuant to § 24-13-720, the action is properly considered in habeas corpus. *See id.* at 487-88; *Graham*

v. Broglin, 922 F.3d 379, 381 (7th Cir. 1991) (holding that claims seeking "a quantum change in the level of custody" including "freedom subject to the limited reporting and financial constraints of bond or parole or probation" are properly considered in habeas corpus). *See generally Lynce v. Mathis*, --- U.S. ----, ---- & n. 4, 117 S.Ct. 891, 893 & n. 4, 137 L.Ed.2d 63 (1997) (noting that prisoner contesting the revocation of credits, the award of which entitled the prisoner to release under conditions similar to parole, brought the action as a petition for a writ of habeas corpus and discussing the exhaustion of state remedies). Since the *Rooker-Feldman* doctrine does not divest us of subject-matter jurisdiction, we must consider the merits of the Inmates' ex post facto challenge to the application of the 1993 amendment to § 24-13-720.

III.

The constitutional provision on which the Inmates rely forbids the States from enacting "any ... ex post facto Law." U.S. Const. art. I, § 10, cl. 1. Generally speaking, the Ex Post Facto Clause prohibits, *inter alia*, the enactment of "any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' " *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26, 18 L.Ed. 356 (1867)). In so doing, it seeks to ensure that individuals receive fair warning of the law and to guard against "arbitrary and potentially vindictive legislation." *Id.* at 28-29.

A law violates the Ex Post Facto Clause when it is retrospective--*i.e.*, when it applies to events predating its enactment--and it disadvantages those to whom it applies. *See Lynce v. Mathis*, --- U.S. ----, ----, 117 S.Ct. 891, 896, 137 L.Ed.2d 63 (1997). The latter condition is satisfied by any provision "which punishes as a crime an act previously committed, which was innocent when done; which makes more

burdensome the punishment for a crime, after its commission[;] or which deprives one charged with crime of any defense available according to law at the time when the act was committed." *Beazell v. Ohio*, 269 U.S. 167, 169, 46 S.Ct. 68, 70 L.Ed. 216 (1925). Here, the Inmates maintain that application to them of § 24-13-720 as amended in 1993 would increase the punishment for a crime after its commission by depriving them of a six-month reduction in the sentenced period of incarceration to which they were entitled under the 1983 version of the law. *See id.* The district court accepted this argument. Whether the 1993 amendment to § 24-13-720 is ex post facto as applied to the Inmates is a question of law that we review de novo. *See United States v. Presley*, 52 F.3d 64, 67 (4th Cir. 1995).

We begin by noting that there is no question presented regarding the first prong of the ex post facto analysis, *i.e.*, whether the 1993 amendment to § 24-13-720 is retrospective as applied to the Inmates. In *Plyler*, the Supreme Court of South Carolina plainly held that § 24-13-720 as originally enacted entitled all inmates serving sentences of less than life imprisonment to mandatory release on furlough six months prior to the expiration of their sentences. *See Plyler*, 438 S.E.2d at 246. In reaching this conclusion, the court rejected the State's argument that the 1993 amendment merely clarified the law to make plain that only those inmates who satisfied the criteria of § 24-13-710 were eligible for release on furlough pursuant to § 24-13- 720. *See id.* Instead, the court determined, the 1993 amendment constituted a substantive change in the law. *See id.* Even if we were to conclude that this holding is incorrect, we are bound by it as a final determination of state law by the highest court of the state. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (explaining that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). Thus, there can be no dispute that application to the Inmates of the 1993 amendment is retrospective.

We now turn to the second prong of the ex post facto analysis: Whether application of the amended version of § 24-13-720 to prisoners serving sentences of less than life imprisonment for crimes committed between the enactment of § 24-13-720 in 1983 and its amendment in 1993 would amount to an increase in punishment for crimes previously committed. The State maintains that § 24-13-720 is a furlough program designed to alleviate prison overcrowding and that as such it is not a part of the Inmates' sentences. Therefore, the State claims that the alteration of the program cannot be considered an unconstitutional increase in punishment.

The Supreme Court has recently and emphatically rejected precisely this argument as irrelevant to an ex post facto inquiry. *See Lynce*, --- U.S. at ---- - ----, 117 S.Ct. at 896-98. In *Lynce*, Florida argued that the revocation of early release credits provided pursuant to a program established by the state legislature did not implicate the Ex Post Facto Clause because the program had been created solely for the purpose of alleviating prison overcrowding. The Court rejected this argument, explaining that the purpose of the state legislature was not dispositive of whether the provision violated the Ex Post Facto Clause. *See id.* Rather, the pertinent issue before the Court was "whether the cancellation of 1,860 days of accumulated provisional credits had the effect of lengthening petitioner's period of incarceration." *Id.* at 896.

Similarly, here, the determination of whether application to the Inmates of the 1993 amendment to § 24-13-720 is ex post facto does not depend on whether the provision is " 'in some technical sense part of the sentence.' " *Id.* at 898 (quoting *Weaver*, 450 U.S. at 32). Rather, the question is whether application to the Inmates of § 24-13-720 as amended in 1993 will extend the period of their incarceration. *See id.* at 896; *Weaver*, 450 U.S. at 33. And, in *Lynce* the Court expressly held that "retroactive alteration of parole or early release provisions,

like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits are 'one determinant of petitioner's prison term ... and ... [the petitioner's] effective sentence is altered once this determinant is changed.' " *Lynce*, --- U.S. at ----, 117 S.Ct. at 898 (emphasis omitted) (alterations in original) (quoting *Weaver*, 450 U.S. at 32).

The application to the Inmates of the 1993 amendment to § 24-13-720 unquestionably has the effect of increasing the length of their incarceration. Pursuant to the 1983 version of the statute as interpreted by the Supreme Court of South Carolina, the Inmates would be entitled to release from incarceration on furlough six months prior to the expiration of their sentences, assuming the other criteria of the provision are satisfied. Under the statute as amended in 1993, however, prisoners who could not satisfy the additional requirements of § 24-13-710 would not be eligible to participate in the program and would be required to serve the final six months of their sentences in prison. As discussed above, the program established by § 24-13-720 is indistinguishable from parole. Thus, for all practical purposes the application to the Inmates of the 1993 amendment to § 24-13-720 deprives them of mandatory parole. As desirable as such a result may be--particularly in view of the violent nature of the crimes for which some of these individuals are incarcerated--such a retroactive change in the law is violative of the Ex Post Facto Clause. *See Lynce*, --- U.S. at ----, 117 S.Ct. at 898; *Weaver*, 450 U.S. at 33-36; *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 663, 94 S.Ct. 2532, 41 L.Ed.2d 383 (1974) (noting that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present [a] serious [ex post facto] question"); *Jones v. Murray*, 962 F.2d 302, 310 (4th Cir. 1992) (holding that a Virginia statute delaying mandatory release on parole for inmates who refuse to provide a blood sample for DNA testing violates the Ex Post Facto Clause); *Fender v. Thompson*, 883 F.2d 303, 305-07 (4th Cir.1989) (declaring a

statute that retrospectively eliminated parole eligibility for persons sentenced to life imprisonment who escaped from custody unconstitutional as ex post facto and collecting cases holding that changes in parole eligibility that are both retroactive and unfavorable are violative of the Ex Post Facto Clause). Therefore, we are left with no choice but to affirm the decision of the district court.[9]

IV.

In summary, in 1983 the General Assembly of South Carolina passed a statute that reduced by six months the incarcerative sentence of all inmates serving sentences of less than life imprisonment, including those who had committed violent crimes. It is not for a court to question the wisdom of such a law, for clearly it was within the power of the state legislature to enact. Ten years later, the General Assembly elected to amend that law and to limit the class of inmates who would be entitled to the six-month reduction. We hold that Supreme Court and circuit

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[9]The State has not argued that the Inmates' ex post facto claim is barred by the new rule doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), thereby waiving this issue. *See Collins v. Youngblood*, 497 U.S. 37, 40-41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). In any event, it appears that *Teague* has no application here because the Inmates do not challenge the validity of their convictions or sentences. *See O'Dell v. Netherland*, --- U.S. ---, ---, 117 S.Ct. 1969, 1973, 138 L.Ed.2d 351 (1997) (explaining that the *Teague* doctrine applies when a state prisoner seeks to overturn his conviction or sentence on federal collateral review); *Helton v. Fauver*, 930 F.2d 1040, 1047 n. 11 (3d Cir. 1991) (concluding that a habeas corpus action challenging as violative of the Ex Post Facto Clause a state court interpretation of a statute setting forth the circumstances under which a juvenile could be tried as an adult "does not implicate the policy favoring the finality of judgments that was at issue in *Teague*"); *cf. Lynce*, --- U.S. at --- - ---, 117 S.Ct. at 895-98 (granting habeas relief on claim that revocation of credits, the award of which entitled the petitioner to release under conditions similar to parole, violated the Ex Post Facto Clause without addressing *Teague*).

precedent obligates us to declare the retroactive application of the 1993 amendment to § 24-13-720 to prisoners serving sentences of less than life imprisonment for crimes committed between the enactment of § 24-13-720 in 1983 and its amendment in 1993 unconstitutional as violative of the Ex Post Facto Clause of the United States Constitution. We also hold that under *Preiser*, an action asserting entitlement to release from physical confinement properly is considered in habeas corpus. We therefore conclude that although in substance this litigation seeks to overturn a decision of the Supreme Court of South Carolina, the *Rooker-Feldman* doctrine does not operate to deprive us of subject-matter jurisdiction. Accordingly, we affirm.[10]

AFFIRMED.

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[10]We express no opinion concerning whether the State appropriately may seek reconsideration of the determination of the Supreme Court of South Carolina that the 1993 amendment to § 24-13-720 constituted a substantive change in the law rather than a clarification. *See Plyler*, 438 S.E.2d at 246. Our review of *Plyler*, however, indicates that the decision of the state court in this regard may have been influenced by its conclusion that application to the Inmates of the 1993 amendment posed no ex post facto problem because the supervised furlough program was not a part of the Inmates' sentences. *See id.* at 245 n. 1. In view of the recent decision of the Supreme Court in *Lynce*, this reasoning clearly is no longer tenable. Inasmuch as *Lynce* undermines--indeed, as explained in the body of this opinion, compels rejection of--the decision of the Supreme Court of South Carolina regarding the ex post facto issue, the conclusion of that court with respect to whether the 1993 amendment to § 24-13-720 was a clarification or a substantive change may also be open to question. This is particularly true in light of the fact that § 24-13-720 was amended during the pendency of litigation concerning the proper interpretation of the provision, supporting the view that the changes effected by the amendment were clarifying rather than substantive. *See* 1A Norman J. Singer, *Statutes & Statutory Construction* § 22.31 (5th ed.1991) (explaining that the existence of a controversy regarding the proper interpretation of a statute prior to its amendment rebuts the presumption that an amendment is substantive in nature).

APPENDIX C

Order of the District Court

Harry Plyler, et al., Plaintiff
v.
Parker Evatt, Commissioner, South Carolina Department of Corrections, Defendant,

Civ. A. No. 3:94-190-2BD

United States District Court,
D. South Carolina,

September 26, 1996.

Plaintiffs brought this action alleging that they were being denied an early release from their prison sentences, in violation of the Ex Post Facto Clause of the United States Constitution. They filed their claims pursuant to 28 U.S.C. §2254 and 42 U.S.C. §1983 and sought permission of the Court to proceed as a subclass of the lawsuit earlier filed as *Plyler v. Leeke*, C/A No. 82-876-2.[11] The proposed subclass consists of all inmates sentenced for crimes committed between June 13, 1983, and June 14, 1993, except those who are serving life sentences. Their

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[11] Plaintiffs filed this action under 42 U.S.C. §1983 but also exhausted their state remedies under 28 U.S.C. §2254. Careful review indicates that the action is probably best characterized as one under §2254 because it questions the "fact or length" of plaintiffs' confinement. *See Preiser v. Rodriguez*, 411 U.S. 475, 490 (1973). Nonetheless, because plaintiffs also are seeking review of the issues as a subclass of the class in *Plyler v. Leeke*, *supra*, the court has used the term "plaintiffs" throughout this order.

claims hinge on the issue of whether a change in South Carolina law can be applied retroactively to this class of inmates. Finding that it cannot, this Court directs that the relief sought by plaintiffs be granted for the reasons which follow.

In 1983, the South Carolina Legislature passed S.C. Code Ann. §24-13-720, which provided for the implementation of a "furlough" program as follows:

> Unless sentenced to life imprisonment, an inmate under the jurisdiction or control of the Department of Corrections shall, within six months of the expiration of his sentence, be placed with the program provided for in §24-13-710 and shall be subject to every rule, regulation, and condition of such program. No inmate otherwise eligible under the provisions of this section for placement with the program under §24-13-710 may be so placed unless he has maintained a clear disciplinary record for at least six (6) months prior to eligibility for placement with the program.

S.C. Code Ann. §24-13-720, as enacted June 13, 1983.

This program remained in effect until the South Carolina Legislature amended the statute on June 14, 1993. The amended statute is quoted below with the changes underlined.

> Unless sentenced to life imprisonment, an inmate under the jurisdiction or control of the Department of Corrections *who has not been convicted of a violent crime under the provisions of §16-11-60 may*, within six (6) months of the expiration of his sentence, be placed with the program . . . . No inmate otherwise eligible . . . may be so placed unless he has *qualified under the selection criteria*

> *and process authorized by the provisions of §24-13-710. He must also have* maintained a clear disciplinary record for at least six (6) months prior to eligibility for placement with the program.

S.C. Code Ann §24-13-720, as enacted June 14, 1993.

The real effect of the 1983 statute was to shorten the sentence of nearly every inmate who entered the South Carolina Department of Corrections. Between 1983 and 1993, inmates sentenced in South Carolina could expect to be released six months before the official end of their sentences. This early release was mandated by the section quoted above and the only prerequisite was a disciplinary record free of infractions in the six months prior to release. In 1993, however, the Legislature amended the statute to prevent "violent offenders" from participating in the program and to require them to meet certain other criteria.

Plaintiffs filed this action, alleging that this change was unconstitutional as an ex post facto law because it lengthened their sentences and required them to serve more time before release. They sought to have the Court find the change in the law unconstitutional, at least as it applied to the class of inmates sentenced for crimes committed between 1983 and 1993. Defendant denied that the change was unconstitutional, arguing that the change in the furlough program was merely a procedural change which did not have a direct impact on plaintiffs' sentences. Defendant further stated that the original enactment of the statute in 1983 was intended as a procedural mechanism designed to alleviate prison overcrowding, not to "bestow upon the plaintiff class a substantive personal right." See Defendant's Brief filed April 13, 1994. Despite this contention, however, §24-13-720 did exactly that. It required the Department of Corrections to release any inmate if he was within six months of the conclusion of his sentence and had a clean disciplinary record.

In accordance with the Court's order of reference, 28 U.S.C. §636(b), 28 U.S.C. §1915, and Local Rule 19.02(b)(2)(D) (D.S.C.), the matter was referred to United States Magistrate Judge Bristow Marchant who filed a report and recommendation on December 13, 1994. In that report, he recommended that the plaintiff class be certified but also recommended that the defendant's motion for summary judgment be granted, after finding that the furlough program established under S.C. Code Ann. §24-13-720 was not an inherent part of the prison sentence imposed on an inmate. He also noted that the 1993 change did not increase plaintiffs' sentences, alter their parole dates, or affect substantial personal rights.

Plaintiffs filed objections to the magistrate judge's report and recommendation, arguing that the "furlough" program was not similar to the one used for comparison by the magistrate judge and that its mandatory nature is a factor to be considered in reaching a conclusion. On the basis of these two arguments, they contend that the conclusion reached by the magistrate judge was in error.[12]

This matter is now before the Court for disposition. In accordance with 28 U.S.C. §636(b)(1), the Court is charged with making a *de novo* determination of any portions of the magistrate judge's report and recommendation to which a specific objection is made. We may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge, or recommit the

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[12]Both parties also discussed the applicability of decisions related to the ex post facto nature of statutory changes in the frequency of parole hearings. *See Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir.), *cert. dismissed*, 114 S.Ct. 593 (1993). That decision was reversed in a later Supreme Court case, *California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995), in which such a change was found to be procedural.

matter with instructions. *Id.* As part of this Court's consideration of the matter, a hearing was held on May 2, 1995, at which the parties presented arguments in support of their positions. *See* transcript of hearing May 2, 1995.

The Ex Post Facto Clause of the United States Constitution[13] prevents the imposition or change of laws which would retroactively make behavior punishable or which would increase the punishment allowed for criminal acts. *Collins v. Youngblood*, 497 U.S. 37 (1990). The Clause defines an ex post facto law as something which would punish a person for an act which was not a crime when the act was committed, which makes the punishment for a crime more burdensome after the act was committed or which, after the act for which he was charged, deprives a person of any defense available to him at the time of the action.

When the Supreme Court of South Carolina discussed this issue, it found that all inmates who had already reached the final six months of their sentence prior to passage of the 1993 Act and had good disciplinary records were entitled to release because their right to release had matured. Those inmates who did not meet both criteria before the effective date, however, were not entitled to participate in the program except under the amended statute. *Plyler v. Evatt*, 438 S.E.2d 244, 245 (S.C. 1993). In reaching its conclusion that the latter group of inmates were not subjected to an ex post facto violation, the Court decided that the furlough program was not a part of the inmates' sentences.

A part of the difficulty in analyzing this case arises from the semantics used by the parties. The statute in question refers to the early release of these prisoners as a "furlough" program. The case used by the magistrate judge for comparison involves a

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[13] Article I, §§9 and 10.

furlough program of the type in which inmates are allowed to go for brief periods to visit their families. *See Millhouse v. Levi*, 548 F.2d 357 (D.C. Cir. 1976). The plaintiffs chose to link their situation to the parole question considered in a number of cases culminating in the decisions in *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir.), *cert. dismissed*, 114 S.Ct. 593 (1993), and in *California Department of Corrections v. Morales*, 115 S.Ct. 1597 (1995). Unfortunately for plaintiffs, while the *Roller* decision was favorable, the *Morales* case was not and a change in the frequency of parole hearings was found to be a procedural issue.

The situation presented here is analogous to that in *Weaver v. Graham*, 450 U.S. 24 (1981). The United States Supreme Court determined that the calculation of good time credits may not be changed after the start of an inmate's sentence. The State of Florida had decreased the amount of gain time which it awarded inmates for their good conduct in prison. The Court determined that the statute could not be applied to inmates convicted before its effective date and that those inmates must be awarded gain time at the rate in effect at the time they were convicted. The Court noted that a law is ex post facto if it operates retrospectively and if it "disadvantages the offender." *Id.* at 29.

> Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

Id. at 30-31. The Court also noted that the basis for the ex post facto prohibition is not whether an individual is entitled to a lesser punishment, but whether he had fair notice of the punishment to which he would be subjected. In its discussion, the Court also distinguished ex post facto concerns from "vested rights." *Id.* at 31, nn. 12 and 13.

The *Weaver* case need not be discussed at length; however, the similarities between the issues presented and the arguments advanced by each of the parties is remarkable. In both cases, the issue presented is whether the state can lawfully renege on its "promise" to inmates to reduce their sentences by some period of time, a guarantee that was in effect when they committed their crimes. Conversely, the effect of the Legislature's action was to lengthen the amount of the sentence an inmate had to serve before his release. The answer here must be, as it was in *Weaver*, that the State cannot retroactively increase the punishment for a crime. The action of the South Carolina Legislature in 1993 took away a credit that all of the members of the subclass received to shorten their sentences. The only "requirement" to receive that credit was good behavior for the six months prior to the possible release date. That requirement is also the only one set forth in *Weaver*.

> [A]n inmate is automatically entitled to the monthly gain time simply for avoiding disciplinary infractions and performing his assigned tasks . . . . Thus, the new provision constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment. This result runs afoul of the prohibition against ex post facto laws.

Id. at 35-36. Quoting the respondents' brief in *Weaver*, the Court indicated, "'[A]ll any prisoner had to do . . . was to stay out of trouble.'" *Id.* at 36, n. 20. This statement was equally true under the 1983 Act discussed here.

Even if the issue presented here is also analyzed under the *Morales* precedent, plaintiffs must prevail. The Court in *Morales* noted that the change in question there, the increased period of time between parole hearings for some inmates, "creates only the

most speculative and attenuated possibility of . . . increasing the measure of punishment for covered crimes, ..." The 1993 change in the South Carolina law produced a certain change in the length of the sentences to be served by a large group of inmates. Every one of those persons will be required to serve a sentence six months longer than that mandated when he (or she) entered the South Carolina Department of Corrections. Such a change can be nothing other than a substantive change which violates the Ex Post Facto Clause of the United States Constitution.

Members of the plaintiff subclass are entitled to the reduction in their prison sentence guaranteed by the 1983 statute despite later changes in South Carolina law.[14]

IT IS HEREBY ORDERED that the defendant's motion for summary judgment be denied. Plaintiffs' motion to certify a subclass to include all inmates whose crimes were committed between June 13, 1983, and June 14, 1993, is granted. Plaintiffs' request for injunctive relief is also granted.

AND IT IS SO ORDERED.

/s/ C. Weston Houck
C. Weston Houck
Chief United States District Judge

September 26, 1996

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[14]This conclusion may be moot as to some inmates who, if they were within six months of their anticipated release date shortly after the passage of the 1993 Act, have since been released.

APPENDIX D

Order of the Court of Appeals Denying Rehearing and Rehearing En Banc

Filed November 13, 1997

Harry Allen PLYLER, et al., Petitioners-Appellees,

v.

Michael W. MOORE, Director, South Carolina Department of Corrections,
Respondent-Appellant.

No. 96-7689.

United States Court of Appeals,
Fourth Circuit.

On Petition for Rehearing and
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court

/s/ Patricia S. Connor
Clerk

APPENDIX E

Order of the Court of Appeals Granting Stay of Mandate

Filed November 25, 1997

Harry Allen PLYLER, et al., Petitioners-Appellees,

v.

Michael W. MOORE, Director, South Carolina Department of Corrections,
Respondent-Appellant.

No. 96-7689.

United States Court of Appeals,
Fourth Circuit.

ORDER

The appellant has filed a motion to stay the mandate.

The Court grants the motion and stays issuance of the mandate pending the timely filing of a petition for writ of certiorari.

For the Court

/s/ Patricia S. Connor
Clerk

APPENDIX F

Order of the District Court
Granting Stay Pending Appeal

Harry Plyler, et al., Plaintiff
v.
Parker Evatt, Commissioner, South Carolina Department of Corrections, Defendant,

Civ. A. No. 3:94-190-2BD

United States District Court,
D. South Carolina,

October 16, 1996.

In 1983 the South Carolina General Assembly passed a law which provided that, except for those serving life sentences, all inmates under the jurisdiction or control of the South Carolina Department of Corrections with clear disciplinary records for the preceding six months be placed in a supervised furlough program for the last six months of their sentences.[15] The application of said law resulted in virtually all non-lifers being released from confinement six months before the otherwise official end of their sentences. In 1993 the aforementioned statute was amended to, *inter alia*, also exclude from its application inmates convicted of violent crimes. The State of South Carolina applied said amendment retroactively. The plaintiffs herein then filed this action claiming that such an application added sixth months to their sentences and rendered the 1993 amendment on

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[15] South Carolina Code Ann. § 24-13-720.

unconstitutional *ex post facto* law. In an order filed on September 27, 1996, this court agreed with plaintiffs. The defendants have filed an appeal therefrom with the Fourth Circuit Court of Appeals. The matter now comes on before this court on motion of the defendants to stay the September 27, 1996, order pending appeal. The plaintiffs have filed their memorandum in opposition, and the motion for a stay is ripe for decision.

Rule 62(c) of the Federal Rules of Criminal Procedure permits the court to grant such motions. *Blackwelder Furniture Co. v. Seilig Manufacturing Co.*, 550 F.2d 189 (4th Cir. 1977), sets forth the factors that must be taken into consideration before one should be granted, and the court has very carefully weighed the same in this matter. It is convinced that the defendants have met their burden. This court's order of September 27, 1996, is, therefore, stayed until the Fourth Circuit Court of Appeals decides the appeal in this matter now before it.

AND IT IS SO ORDERED.

/s/ C. Weston Houck
C. Weston Houck
Chief United States District Judge

October 16, 1996

APPENDIX G

Denial by Chief Justice Rehnquist of Motion to Vacate Stay

Harry Allen Plyler, et al.,
v.
Michael Moore, Director, South Carolina Department of Corrections

Application No. A-439

Supreme Court of the United States
Office of the Clerk

December 16, 1997

The application to vacate the stay of mandate granted by the United States Court of Appeals for the Fourth Circuit in the above-entitled case has been presented to the Chief Justice who on December 16, 1997, denied the application

This letter has been sent to those designated on the attached notification list.

WILLIAM K. SUTER, CLERK

/s/ Cynthia Rapp
Assistant Clerk

APPENDIX H

Denial by Full Supreme Court of Motion to Vacate Stay

Harry Allen Plyler, et al.,
v.
Michael W. Moore, Director, South Carolina Department of Corrections,

Application No. 439

Supreme Court of the United States
Office of the Clerk

January 12, 1997

The Court today entered the following order in the above-entitled case:

"The application to vacate stay of mandate addressed to Justice Stevens and referred to the Court is denied."

WILLIAM K. SUTER, CLERK

/s/ Francis J. Lorson
Chief Deputy Clerk

APPENDIX I

Extension of Time to File Petition for Certiorari Granted by Chief Justice Rehnquist

Michael W. Moore, Director, South Carolina Department of Corrections,
v.
Harry Allen Plyler, et al.

Application No. A-537

Supreme Court of the United States
Office of the Clerk

January 27, 1998

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on January 27, 1998, extended the time to and including March 13, 1998.

This letter has been sent to those designated on the attached notification list.

WILLIAM K. SUTER, CLERK

/s/ Loretta S. Ruffin
Assistant Clerk

APPENDIX J

Opinion of the Supreme Court of South Carolina in Prior State Litigation

Harry PLYLER, for and on behalf of
the Plaintiff Class in Plyler, et al. v. Evatt, et al.,
United States District Court Number C/A 82-876-2, as their representative,

Respondent,

v.

Parker EVATT, Commissioner, South Carolina Department of Corrections, and
Michael Cavanaugh, Commissioner, South Carolina Department of Probation, Parole and Pardon Services,

Appellants.

No. 23928.

Supreme Court of South Carolina.

Heard June 8, 1993.

Refiled Nov. 8, 1993.

ORDER

We grant appellants' petition for rehearing. The original opinion is withdrawn and the following substituted therefor.

FINNEY, Justice:

This is a declaratory judgment action construing S.C.Code Ann. §24-13-720 (1989) prior to its 1993 amendment. The circuit court held the statute entitled all prisoners within six months expiration of their sentence, except those serving a life sentence or with recent disciplinary infractions, to participate in a Supervised Furlough Program (Program). The Commissioners of the Corrections Department and the Department of Probation, Parole and Pardon Services (the State) appeal. We affirm the circuit court's order and hold the 1993 amendment constituted a change in the law. All persons meeting the statutory requirements prior to the 1993 amendment are entitled to participate in the Program.[1]

South Carolina Code Ann. § 24-13-710 (1989) mandates the creation of a Supervised Furlough Program for "carefully screened and selected inmates who have served the mandatory minimum sentence as required by law" and who have not committed certain enumerated offenses.[2] The statute places five additional explicit conditions on eligibility, and permits the responsible agencies to create additional criteria for participation. *Id.*

Before its amendment, § 24-13-720 read, in pertinent part: Unless sentenced to life imprisonment, an inmate ... shall,

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[1]Thus individuals who were not eligible for release prior to June 14, 1993, may participate in the Program only if qualified under the amended statute. There is no ex post facto violation in applying the amended statute's criteria to individuals who committed offenses before its effective date because the Program is not part of the defendant's sentence. See *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989), *overruled in part, Griffin v. State*, — S.C. —, 433 S.E.2d 862 (1993).

[2]Violent crimes as defined in S.C.Code Ann. § 16-1-60 (1985); third degree criminal sexual conduct under S.C.Code Ann. § 16-3-654 (1985); and attempting or committing a lewd action on a child in violation of S.C.Code Ann. § 16-15-140 (1985).

within six months of the expiration of his sentence, be placed with the program provided for in § 24-13-710 and shall be subject to every rule, regulation, and condition of such program. No inmate otherwise eligible for ... the program ... may be so placed unless he has maintained a clear disciplinary record for at least six months prior to eligibility for [such] placement.... The circuit court held that § 710 and § 720 referred to the separate classes of inmates with different criteria for participation in the Program.

The State argues that the circuit court erred in failing to hold that an inmate eligible under § 720 must also meet the eligibility criteria found in § 710, as well as the additional criteria created under that statute's authority before he can participate in the Program. This interpretation of § 720 has been consistently applied by the State since the statute's enactment in 1983.

While we give great weight to an agency's long-standing construction of a statute, such a construction is not dispositive. *Gilstrap v. South Carolina Budget and Control Bd.*, --- S.C. ----, 423 S.E.2d 101 (1992). We agree with the circuit court that the two statutes refer to two different classes of inmates and that the conditions for participation created by § 710 are not implied in § 720. Further, the primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *Gilstrap v. South Carolina Budget and Control Bd., supra.* We agree with the circuit court that the Legislature enacted § 720 to ensure a supervised transition period for inmates returning to society after an extended period of incarceration.

In 1993, § 24-13-720 was significantly amended. The changes are reflected below, with the added language underlined and the deleted language lined out: Unless sentenced to life imprisonment, an inmate ... who has not been convicted of a violent crime under the provisions of Section 16-1-60 may, within six months of the expiration of his sentence, be placed with the program provided for in § 24-13-710 and is subject to

every rule, regulation, and condition of the program. No inmate otherwise eligible under the provisions of this section for placement with the program ... may be so placed unless he has qualified under the selection criteria and process authorized by the provisions of Section 24-13-710. He must also have maintained a clear disciplinary record for at least six months prior to eligibility for the placement....

We are asked to decide whether this statutory amendment was a clarification of the original statute and thus indicative of the legislature's original intent, or whether it is a change in the law. We find the amendment made material changes from the original statute and thus is a departure from the original statute and not a clarification of it. *See North River Ins. Co. v. Gibson*, 244 S.C. 393, 137 S.E.2d 264 (1964). Therefore, the trial court's construction of the pre-amendment statutory language is

AFFIRMED.

HARWELL, C.J., and CHANDLER, TOAL and MOORE, JJ., concur.